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HAWAII LABOR
RELATIONS BOARD

Attorneys for Director of Labor
and Industrial Relations

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR,)	CASE NO. OSH 2009-11
)	(Inspection No. 311435952)
DEPARTMENT OF LABOR AND)	
INDUSTRIAL RELATIONS,)	STIPULATION AND SETTLEMENT
)	AGREEMENT; EXHIBIT A; APPROVAL
Complainant,)	AND ORDER
)	
vs.)	
)	
KELLY CONSTRUCTION, INC.,)	
)	
Respondent.)	

STIPULATION AND SETTLEMENT AGREEMENT

Complainant Director of Labor and Industrial Relations ("Director") and Respondent KELLY CONSTRUCTION, INC. ("Respondent"), having reached a full and complete settlement of the above-captioned contested case presently pending before the Hawaii Labor Relations Board ("Board") stipulate and agree as follows:

On or about November 17, 2008 to November 19, 2008, the Director, by and through the State of Hawaii's Occupational Safety and Health Division ("HIOSH"), inspected

Respondent's workplace located at 72-100 Kaupulehu Drive, Kailua-Kona, Hawaii 96740.

As a consequence of said inspection, the Director, through HIOSH's Administrator, issued a Citation and Notification of Penalty on February 24, 2009 ("Citation") to Respondent alleging violations of the Hawaii Occupational Safety and Health Standards and assessed an aggregate penalty of \$2,275.00. *See* Exhibit A.

Respondent timely contested the Citation.

THEREFORE, to avoid the expense of litigation and to compromise and settle the above-captioned case, the parties, by and through their respective representatives, stipulate and agree as follows:

1. The Board has jurisdiction over this contested case pursuant to section 396-11, Hawaii Revised Statutes ("HRS").
2. At all relevant times, Respondent maintained a workplace at 72-100 Kaupulehu Drive, Kailua-Kona, Hawaii 96740.
3. At all relevant times, Respondent was an employer, as defined in HRS § 396-3, and employed employees, as defined in HRS § 396-3, and was therefore subject to the requirements of HRS chapter 396, the Hawaii Occupational Safety and Health Law.
4. Respondent agrees that it has or will abate each violation listed in the Citation in compliance with the abatement requirements under Hawaii Administrative Rule § 12-51-22. Respondent shall submit the completed abatement certification to HIOSH no later than ten (10) days after this Agreement is filed; failure to timely do so may result in additional penalties or follow up inspections.
5. The violations and corresponding characterizations as stated in the Citation are amended as follows:

- a. Citation 1 Item 1 is entirely deleted.
- b. Citation 1 Item 2a is changed from “serious” to “other”, and the \$875.00 penalty is deleted.
- c. Citation 1 Item 2b is changed from “serious” to “other”.
- d. Citation 1 Item 2c is changed from “serious” to “other”.
- e. Citation 1 Item 3 is changed from “serious” to “other”, and the \$700.00 penalty is deleted.

6. Except for the stipulated amendments described above, the Citation is confirmed in all other respects and upon approval by the Board, this Agreement and the Citation, as amended, shall become a final order of the Director.

7. Respondent shall post a copy of this Agreement and Order in a prominent place at or near the location of the posting of the Citation, and the Agreement and Order shall remain posted for three working days (excluding weekends and State holidays).

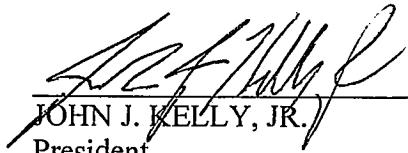
8. Respondent shall continue to comply with HRS chapter 396, the Hawaii Occupational Safety and Health Law, and the related rules.

9. Nothing in this Agreement shall bar the Director from taking any action regarding future acts or practices by Respondent which may be alleged to violate HRS chapter 396, the Hawaii Occupational Safety and Health Law, or the related rules.

10. The Parties agree that upon the approval of this Agreement by the Board,
the Board shall dismiss this case and Respondent's appeal.

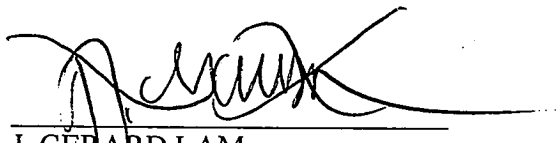
DATED: Honolulu, Hawaii, September 23, 2009.

KELLY CONSTRUCTION, INC.



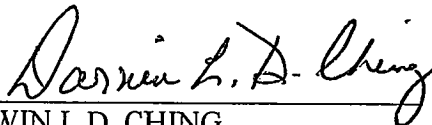
JOHN J. KELLY, JR.
President

APPROVED AS TO FORM:



J. GERARD LAM
Deputy Attorney General
Attorney for Director of Labor and
Industrial Relations, State of Hawaii

DIRECTOR OF LABOR AND
INDUSTRIAL RELATIONS

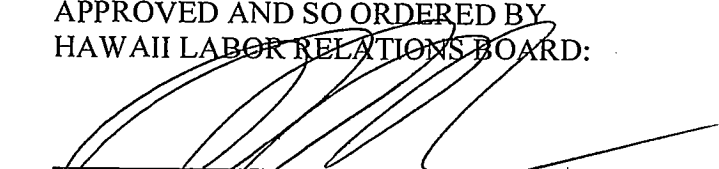


DARWIN L.D. CHING

APPROVED AND SO ORDERED BY
HAWAII LABOR RELATIONS BOARD:

ORDER NO. 351

DATED: September 23, 2009



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

In re: Director, Dept. Of Labor And Indus. Relations v. Kelly Construction, Inc., Case No. OSH
2009-11, Stipulation And Settlement Agreement; Exhibit "A"; Approval And Order.

State of Hawaii

Department of Labor and Industrial Relations
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION
830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HI 96813
Phone: (808)586-9110 FAX: (808)586-9104



Certified Number: 7005 1820 0003 3812 0712

Citation and Notification of Penalty

To:

Kelly Construction Inc
and its successors
P O Box 2727
Kailua Kona, HI 96745

Inspection Number: 311435952 (Charles Clark)
Inspection Date(s): 11/17/2008- 11/19/2008
Issuance Date: 02/24/2009
OSHSO ID: X8851
Optional Report No.: 01409
Inspection Type: Programmed Related
Scope of Inspection: Comprehensive Inspection

Inspection Site:

72-100 Kaupulehu Dr
Kailua Kona, HI 96740

The violation(s) described in this Citation and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.

This Citation and Notification of Penalty describes violations of the Hawaii Occupational Safety and Health Law. The penalty(ies) listed herein is (are) based on these violations. You must abate the violations referred to in this Citation by the dates listed and pay the penalties, unless within 20 calendar days from your receipt of this Citation and Notification of Penalty, you mail a notice of contest to the State of Hawaii Occupational Safety and Health Division (HIOSH) at the address shown above. Please refer to the enclosed booklet (Employer Rights and Responsibilities Following a HIOSH Inspection) which outlines your rights and responsibilities and which should be read in conjunction with this form. Issuance of this Citation does not constitute a finding that a violation of the Law has occurred unless there is a failure to contest as provided for in the Law or, if contested, unless this Citation is affirmed by the Hawaii Labor Relations Board (HLRB) or a court.

Posting - The law requires that a copy of this Citation and Notification of Penalty be posted immediately in a prominent place at or near the location of the violation(s) cited herein, or, if it is not practicable because of the nature of the employer's operations, where it will be readily observable by all affected employees. This Citation must remain posted until the violation(s) cited herein has (have) been abated, or for 3 working days (excluding weekends and State holidays), whichever is longer. The penalty dollar amounts need not be posted and may be marked out or covered up prior to posting.

Informal Conference - An informal conference is not required. However, if you wish to have such a conference you may request one with the Administrator during the 20 calendar day contest period. During such an informal conference, you may present any evidence or views which you believe would support an adjustment to the citation(s) and/or penalty(ies).

If you are considering a request for an informal conference to discuss any issues related to this Citation and Notification of Penalty, you must take care to schedule it early enough to allow time to contest after the informal conference, should you decide to do so. Please keep in mind that a written letter of intent to contest must be submitted to the Administrator within 20 calendar days of your receipt of this Citation. The running of this contest period is not interrupted by an informal conference.

If you decide to request an informal conference, please complete, remove and post the page 5, Notice to Employees, next to this Citation and Notification of Penalty as soon as the time, date, and place of the informal conference have been determined. Be sure to bring to the conference any and all supporting documentation of existing conditions as well as any abatement steps taken thus far. If conditions warrant, we can enter into an informal settlement agreement which amicably resolves this matter without litigation or contest.

Employers' Right to Contest - You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest penalties and/or abatement dates without contesting the underlying violations. Unless you inform the Administrator in writing that you intend to contest the citation(s) and/or penalty(ies) within 20 calendar days after receipt, the citation(s) and the penalty(ies) will become a final order of the Department of Labor and Industrial Relations and may not be reviewed by any court or agency. Once a letter of contest is received, it becomes the jurisdiction of the HLRB.

Penalty Payment - Penalties are due within 20 calendar days of receipt of this notification unless contested. Make your check or money order payable to "Director of Budget and Finance." Please indicate the Inspection Number on the remittance.

HIOSH does not agree to any restrictions or conditions or endorsements put on any check or money order for less than the full amount due, and will cash the check or money order as if these restrictions, conditions, or endorsements do not exist.

Notification of Corrective Action - For each violations which you do not contest, you are required by Section 12-51-22 to submit an Abatement Certification to HIOSH. The certification must be sent by you within 5 calendar days of the abatement date indicated on the citation. For **Willful** and **Repeat** violations, documents (examples: photos, copies of receipts, training records, etc.) demonstrating that abatement is complete must accompany the certification. Where the citation is classified as **Serious** and the citation states that abatement documentation is required, documents such as those described above are required to be submitted along with the abatement certificate. If the citation indicates that the violation was corrected during the inspection, no abatement certification is required for that item.

All abatement verification documents must contain the following information: 1) Your name and address; 2) the inspection number (found on the front page); 3) the citation and citation item number(s) to which the submission relates; 4) a statement that the information is accurate; 5) the signature of the employer or employer's authorized representative; 6) the date the hazard was corrected; 7) a brief statement of how the hazard was corrected; and 8) a statement that affected employees and their representatives have been informed of the abatement.

The law also requires a copy of all abatement verification documents, required by Section 12-51-22 to be sent to HIOSH, also be posted at the location where the violation appeared and the corrective action took place.

Employer Discrimination Unlawful - The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he/she has been discriminated against may file a complaint no later than 60 days after the discrimination occurred with the Hawaii Occupational Safety and Health Division at the address shown above.

Employer Rights and Responsibilities - The enclosed booklet (Employer Rights and Responsibilities Following a HIOSH Inspection) outlines additional employer rights and responsibilities and should be read in conjunction with this notification.

Employees' Right to Contest - The law gives an employee or his/her representative the opportunity to object to any abatement date set for a violation if he/she believes the date to be unreasonable. The contest must be mailed to the Hawaii Occupational Safety and Health Division at the address shown above and postmarked within 20 calendar days of the receipt by the employer of this Citation and Notification of Penalty.

Inspection Activity Data - You should be aware that OSHA publishes information on inspection and citation activity on the Internet under the provisions of the Electronic Freedom of Information Act. The information related to your inspection will be available 30 calendar days after the Citation Issuance Date. You are encouraged to review the information concerning your establishment at WWW.OSHA.GOV. If you have any dispute with the accuracy of the information displayed, please contact this office.

ABATEMENT CERTIFICATION

DARWIN L.D. CHING, DIRECTOR
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION
830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HI 96813

Kelly Construction Inc
P O Box 2727
Kailua Kona, HI 96745

The hazard referenced in Inspection Number _____ for the violation identified as
Citation _____ and Item _____ was corrected on _____.
How corrected: _____.

The hazard referenced in Inspection Number _____ for the violation identified as
Citation _____ and Item _____ was corrected on _____.
How corrected: _____.

The hazard referenced in Inspection Number _____ for the violation identified as
Citation _____ and Item _____ was corrected on _____.
How corrected: _____.

The hazard referenced in Inspection Number _____ for the violation identified as
Citation _____ and Item _____ was corrected on _____.
How corrected: _____.

The hazard referenced in Inspection Number _____ for the violation identified as
Citation _____ and Item _____ was corrected on _____.
How corrected: _____.

I attest that the information contained in this document is accurate and that the affected employees and their
representatives have been informed of the abatement activities described in this certification.

Signature

Typed or Printed Name

State of Hawaii

Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division



NOTICE TO EMPLOYEES OF INFORMAL CONFERENCE

An informal conference has been scheduled with HIOSH to discuss the citation(s) issued on 02/24/2009. The conference will be held at the HIOSH office located at 830 PUNCHBOWL STREET, ROOM 425, HONOLULU, HI, 96813 on _____ at _____.

Employees and/or representatives of employees have a right to attend an informal conference.

State of Hawaii
Department of Labor and Industrial Relations
Hawaii Occupational Safety And Health Division

Inspection Number: 311435952
Inspection Dates: 11/17/2008 - 11/19/2008
Issuance Date: 02/24/2009



Citation and Notification of Penalty

Company Name: Kelly Construction Inc
Inspection Site: 72-100 Kaupulehu Dr, Kailua Kona, HI 96740

Citation 1 Item 1 Type of Violation: **Serious**

29 CFR 1926.100(a) [Refer to chapter 12-114.2, HAR] was violated because:

An employee was not wearing a protective helmet (hard hat) and was potentially exposed to over head falling objects when he exited the work area (building).

29 CFR 1926.100(a) states "Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets."

Location: Bridge Suite #9

Date By Which Violation Must be Abated:
Penalty:

Corrected
\$ 700.00

See pages 1 through 5 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

State of Hawaii
Department of Labor and Industrial Relations
Hawaii Occupational Safety And Health Division

Inspection Number: 311435952
Inspection Dates: 11/17/2008-11/19/2008
Issuance Date: 02/24/2009



Citation and Notification of Penalty

Company Name: Kelly Construction Inc
Inspection Site: 72-100 Kaupulehu Dr, Kailua Kona, HI 96740

The alleged violations below (2a-2c) have been grouped because they involve similar or related hazards that may increase the potential for injury or illness.

Citation 1 Item 2a Type of Violation: **Serious**

29 CFR 1926.501(b)(1) [Refer to chapter 12-121.2, HAR] was violated because:

A seven foot wide section of the second floor area that was not guarded by a standard guard railing, instead yellow warning tape was erected at the open sided edge of the floor. The lack of guard railings exposed employees to potential serious injuries due to the fall hazard of 10 feet 3 inches to the lower level."

29 CFR 1926.501(b)(1) states "Unprotected sides and edges. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems."

Location: Bridge Suite #7

Date By Which Violation Must be Abated:
Penalty:

03/02/2009
\$ 875.00

See pages 1 through 5 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.



Citation and Notification of Penalty

Company Name: Kelly Construction Inc
Inspection Site: 72-100 Kaupulehu Dr, Kailua Kona, HI 96740

Citation 1 Item 2b Type of Violation: **Serious**

29 CFR 1926.502(b)(1) [Refer to chapter 12-121.2, HAR] was violated because:

Two employees were working on a 18.5 foot length of an open sided floor that had a top railing that measured only 33.5 inches in height. There was also a 5 foot 6 inch wide section of open sided floor that was only provided with one railing that measured 27 inches in height.

29 CFR 1926.502(b)(1) states "Guardrail systems and their use shall comply with the following provisions:
(1) Top edge height of top rails, or equivalent guardrail system members, shall be 42 inches (1.1 m) plus or minus 3 inches (8 cm) above the walking/working level. When conditions warrant, the height of the top edge may exceed the 45-inch height, provided the guardrail system meets all other criteria of this paragraph.

When employees are using stilts, the top edge height of the top rail, or equivalent member, shall be increased an amount equal to the height of the stilts."

Location: Bridge Suite #7 second floor west end

Date By Which Violation Must be Abated:

03/02/2009



Citation and Notification of Penalty

Company Name: Kelly Construction Inc
Inspection Site: 72-100 Kaupulehu Dr, Kailua Kona, HI 96740

Citation 1 Item 2c Type of Violation: **Serious**

29 CFR 1926.502(b)(2) [Refer to chapter 12-121.2, HAR] was violated because:

Two employees were working on a 4 foot 4 inch wide section of an open sided floor that was missing the midrailing, thus exposing employees to potential serious injuries from a 11 foot fall to the lower level. Employees were also working on a 5 foot 6 inch wide section of an open sided floor that was provided with only one railing that measured 27 inches in height.

29 CFR 1926.502(b)(2) states "Midrails, screens, mesh, intermediate vertical members, or equivalent intermediate structural members shall be installed between the top edge of the guardrail system and the walking/working surface when there is no wall or parapet wall at least 21 inches (53 cm) high."

Location: Bridge Suite #7

Date By Which Violation Must be Abated:

03/02/2009

State of Hawaii
Department of Labor and Industrial Relations
Hawaii Occupational Safety And Health Division

Inspection Number: 311435952
Inspection Dates: 11/17/2008-11/19/2008
Issuance Date: 02/24/2009



Citation and Notification of Penalty

Company Name: Kelly Construction Inc
Inspection Site: 72-100 Kaupulehu Dr, Kailua Kona, HI 96740

Citation 1 Item 3 Type of Violation: **Serious**

29 CFR 1926.451(c)(3) [Refer to chapter 12-130.1, HAR] was violated because:

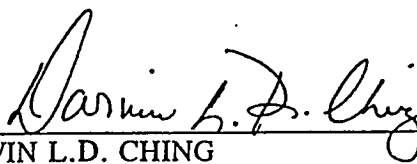
A two stage high tubular 2 welded scaffold system was not plumb and braced to prevent swaying and displacement.

29 CFR 1926.451(c)(3) states "Supported scaffold poles, legs, posts, frames, and uprights shall be plumb and braced to prevent swaying and displacement."

Location: Bridge Suite #3

Date By Which Violation Must be Abated:
Penalty:

03/02/2009
\$ 700.00



DARWIN L.D. CHING
Director

See pages 1 through 5 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

State of Hawaii

Department of Labor and Industrial Relations
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION
830 PUNCHBOWL STREET, ROOM 425
HONOLULU, HI 96813

SUMMARY OF PENALTIES

Company Name: Kelly Construction Inc
Inspection Site: 72-100 Kaupulehu Dr, Kailua Kona, HI 96740
Issuance Date: 02/24/2009

Summary of Penalties for Inspection Number 311435952

Citation 1, Serious	= \$ 2,275.00
TOTAL PENALTIES	= \$ 2,275.00

Make check or money order payable to the "Director of Budget and Finance." Please indicate the inspection number and dba, if company name is different, on the remittance. A fee of \$15.00 will be charged for any returned checks.

If receipt is desired, please indicate with payment; otherwise, your cancelled check will be your receipt.